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Supreme Court, U.S.
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No. 95-1524

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JEREMIAH W. NIXON, Attorney General of Missouri, and JOHN MAUPIN, Chairman, Missouri Ethics Commission,
Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC, a political action committee, W. BEVIS SCHOCK and FREDERICK T. DYER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals hold correctly that limits on candidates' campaign expenditures must be narrowly tailored to achieve a compelling state interest.

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-16) is reported at 71 F.3d 1422 (8th Cir. 1995). The opinion of the district court (Pet. App. A-17 to A-38) is reported at 892 F.Supp. 1246 (E.D. Mo. 1995).

JURISDICTION

The court of appeals entered its judgment on December 19, 1995. The petition for a writ of certiorari was filed on March 18, 1996, and it was placed on the docket on March 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In addition to sections 130.052, 130.053, and 130.130 of the Revised Statutes of Missouri (Pet. App. A-41 to A-46), this case also involves sections 130.011(12)(a), 130.032.1, 130.038, and 130.100 of the Revised Statutes of Missouri (Res. App. 1a-4a).

STATEMENT

Missouri limits candidates' total campaign expenditures, prohibits candidates from carrying over more than $1000, $2000, or $3000 of campaign funds from one election to another, and prohibits candidates from spending more than $100, $200, or $300 of their personal resources to run for state and local office. The court of appeals held that the first two limits on candidates' political expenditures violate the First Amendment because the state had "not demonstrated that these provisions are narrowly tailored to serve a compelling government interest." Pet. App. A-16. On the basis of its decision in a companion case that certain contribution limits violate the First Amendment, the court of appeals also held that these contribution limits were unconstitutional as applied to restrict candidates' spending of personal funds in support of their own campaigns. Pet. App. A-16; *see Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3561 (U.S. Feb. 20, 1996) (No. 95-1258).

1. These three limits on candidates' political expenditures are the product of two sets of 1994 amendments to Missouri's Campaign Finance Disclosure Law. R.S. Mo. §§ 130.011 *et seq.* In July 1994, the Missouri legislature enacted a measure (Senate Bill 650) that limits campaign contributions and expenditures. On November 8, 1994, the Missouri electorate approved a ballot initiative (Proposition A) that also limits campaign contributions and expenditures. The Missouri Attorney General

ruled that Proposition A supersedes Senate Bill 650 to the extent its provisions are more restrictive and that otherwise Senate Bill 650 remains in effect.

a. *Limits On Candidates' Total Campaign Expenditures:* Senate Bill 650 limits the amounts that candidates can spend to run for state and local office. R.S.Mo. § 130.052. Candidates must file an affidavit indicating whether they intend to comply with expenditure limits that range from $30,000 to $1,500,000. R.S.Mo. §§ 130.052.1, 130.052.8. Candidates who reject these limits are subject to two penalties. First, they can accept contributions only from individuals, but opposing candidates who agree to abide by the expenditure limits can accept contributions from political parties, political action committees, corporations and labor unions, as well as from individuals. R.S.Mo. § 130.052.3. Second, candidates who reject the spending limits must file daily reports of contributions and expenditures with the Missouri Ethics Commission after their expenditures exceed the prescribed limit, but candidates who accept the expenditure limits do not have to file daily reports. *Id.* Candidates who reject the spending limits are subject to criminal sanctions for accepting contributions from sources other than individuals and for failing to file daily disclosure reports. R.S.Mo. § 130.081.

b. *Limits on Spending Carryover Campaign Funds:* Proposition A regulates the timing of campaign expenditures and restricts the amount of campaign funds that may be spent in subsequent elections. It provides that every candidate, within 90 days of an election, "shall" either turn over to the Missouri Ethics Commission or return to the contributors "any balance of campaign funds in excess of expenses incurred for the campaign, except for an amount no greater than ten times the individual contribution limit" applicable to that office. R.S.Mo. § 130.130. Given individual contribution limits of $100, $200, or $300 (R.S.Mo. § 130.100), candidates cannot retain more than $1000, $2000, or $3000 of the funds

raised in one campaign and cannot carry these funds over for use in a subsequent campaign to express their political views.[1]

c. *Limits on Campaign Expenditures by Candidates from Their Personal Resources:* Proposition A limits the amount of their own funds that candidates may spend to run for election. It limits "contributions" to candidates for office in Missouri on a sliding scale from $100 to $200 to $300 per election cycle. R.S.Mo. § 130.100. The term "contribution" includes "[a] candidate's own money or property used in support of his candidacy." R.S.Mo. § 130.011(12)(a). As a result, with the exception of expenses for "food, lodging, travel, and payment of any fee necessary to the filing for public office," *id.*, Proposition A prohibits candidates for various elective offices in Missouri from spending more than $100, $200, or $300 of their own funds to support their campaigns.[2]

2. The district court held first that contribution limits as applied to limit contributions or direct expenditures by candidates with their own money violate the First Amendment. Pet. App. A-26. It found that limits on "a candidate's own direct personal speech" are "clearly unconstitutional" under *Buckley v. Valeo,* 424 U.S. 1 (1976) (*per curiam*), and that Missouri had made "no attempt to provide any justification" for "this direct limitation on a candidate's own political speech." *Id.*

The district court also held that the limits on candidates' total campaign expenditures "clearly violate the

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[1] Senate Bill 650 also limits candidates' expenditure of carryover campaign funds. R.S.Mo. § 130.038. These provisions are superseded by the more restrictive provisions of Proposition A.

[2] Senate Bill 650 also establishes contribution limits that apply to contributions by candidates to their own campaigns. R.S.Mo. §§ 130.011(12)(a), 130.032.1. These limits, however, are superseded by the more restrictive contribution limits of Proposition A.

rule of *Buckley*, and cannot withstand strict scrutiny." Pet. App. A-30. Missouri's spending limits "restrict the quantity of political speech" and, like the spending limits held invalid in *Buckley*, do not promote any state interest "in preventing *quid pro quo* corruption." *Id.* at A-28. The state's statutory scheme is "coercive[] because it withdraws an important source of private campaign funding otherwise available to candidates." *Id.* It cannot be justified under "*Buckley's* rationale for upholding spending limits in return for public financing" because "Missouri provides no matching or public funds to any candidates." *Id.*

Finally, the district court held that the restriction on the expenditure of carryover campaign funds could not be justified under *Buckley*. Pet. App. A-30 to A-33. The requirements that candidates "spend-down" their campaign funds, rather than carrying them forward for use in a subsequent election, "limit political speech by telling a candidate *when* he or she must speak." *Id.* at A-32 (emphasis in original). The spend-down limits "do nothing to further the goal of preventing corruption." *Id.* at A-33. Even if limiting the power of incumbency was a compelling interest under *Buckley*, the district court found that the Missouri statute "is not narrowly tailored to serve that interest." *Id.* The state's interest in " 'equaliz[ing]' the spending power of the rich and poor" was not compelling under *Buckley*. *Id.*

3. The court of appeals affirmed the judgment of the district court and held that all three spending limits violate the First Amendment. Pet. App. A-3, A-16.

a. The court of appeals held that the limits imposed by Senate Bill 650 on candidates' total campaign expenditures "are not voluntary." *Id.* at A-7. The two "penalties" imposed on candidates who do not agree to abide by the spending limits "make the limits coercive, not voluntary." *Id.* Missouri's argument that the state simply offered an "incentive" to comply with the expendi-

ture limits was "disingenuous." *Id.* at A-8. The court of appeals found that this "coercive" statute " 'impose[s] direct and substantial restraints on the quantity of political speech,' " which is " 'at the core of First Amendment freedoms.' " *Id.* (citations omitted). This statute could be upheld only " 'if the state can show that it is narrowly drawn to serve a compelling state interest.' " *Id.* (citations omitted). Missouri "failed to meet its burden." *Id.* at A-9.

Although "the state's interest in reducing corruption" was "compelling," Missouri "has failed to explain how the campaign spending limits here in question are narrowly tailored to serve this interest or address these concerns." *Id.* The state's interest in "maintaining individual participation" was in reality an effort to level the playing field, and the court of appeals recognized that under *Buckley* "government may not 'restrict the speech of some elements of our society in order to enhance the relative voice of others.' " *Id.* (*quoting Buckley,* 424 U.S. at 48-49). With regard to "the state's interest in keeping down" election costs, the court of appeals recognized *Buckley's* explicit holding that this interest did not justify limits on "the quantity of campaign spending." *Id.* at A-10 (*quoting Buckley,* 424 U.S. at 57). Missouri, "having failed to show that the expenditure limits . . . are narrowly drawn to serve a compelling state interest," had not justified the "substantial burden" that it places on political speech. *Id.*

b. The court of appeals affirmed the district court's holding that "the spend-down provision imposes a substantial burden on political speech." Pet. App. A-13. The restriction on the expenditure of carryover funds, whether characterized as a requirement that a candidate "speak in the current election" or as a limit on "the quantity of a candidate's speech in future elections," implicated First Amendment rights and was subject to strict scrutiny. *Id.* at A-13 to A-14. Even assuming that some

of the state's interests were compelling, the state had not shown that the spend-down provision was narrowly tailored. With respect to one set of potentially compelling state interests, the court of appeals found that Missouri had "failed to demonstrate that the spend-down provision is narrowly tailored to do either of the things that the state asserts it will do." *Id.* at A-15. With respect to another potentially compelling state interest, the court of appeals found that "the state's arguments are broad and conclusory" and that Missouri "makes no attempt to show how the spend-down provision is narrowly tailored to serve that interest." *Id.*

c. The court of appeals noted that the state had raised an objection to the district court's jurisdiction to consider the question whether Proposition A's campaign contribution limits could be applied to limit candidates' personal expenditures in support of their own campaigns. Pet. App. A-4. Instead of considering the state's jurisdictional point, the court of appeals affirmed the district court's judgment on the basis of its holding in *Carver v. Nixon,* a companion case, that "the Proposition A contribution limits are unconstitutional on their face." *Id.* (citation omitted). The court of appeals held that "those limits necessarily are unconstitutional as applied to candidates as well as to other contributors." *Id.*

4. The petitioners sought review of the court of appeals' judgments that the limits on total campaign expenditures and on carryover expenditures violate the First Amendment, but they did not seek review of the judgment that the limits on candidates' personal expenditures violate the First Amendment. *See* Pet. i (statement of two questions presented); Pet. App. A-41 to A-46 (statutory appendix omits provisions that limit candidates' personal campaign expenditures).

REASONS FOR DENYING THE WRIT

Petitioners have not presented any question that warrants this Court's review. This case involves nothing more than a straightforward application of the well-settled rule that laws burdening political speech are subject to strict scrutiny. Petitioners' contention that the judgment of the court of appeals will inhibit state efforts to regulate campaign finance is wide of the mark. The court of appeals simply required Missouri to make some showing that limits on candidates' campaign expenditures are narrowly tailored to serve a compelling state interest. Missouri, however, did not justify the substantial burdens imposed on candidates' political speech.

1. Petitioners have not suggested any compelling reason why this Court should review the application of basic First Amendment principles. State laws limiting campaign expenditures, like other state laws limiting political speech at the core of the electoral process, are subject to strict scrutiny. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655, 657 (1990); *Buckley v. Valeo*, 424 U.S. 1, 14-23, 39-59 (1976) (*per curiam*); *see McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511, 1519 (1995) ("exacting scrutiny"). The court of appeals applied the correct legal standard. It found that limits on candidates' total campaign expenditures and on the expenditure of carryover campaign funds violate the First Amendment because the state had "not demonstrated that these provisions are narrowly tailored to serve a compelling government interest." Pet. App. A-16.

The court of appeals' judgment does not present any important question about First Amendment limits on candidates' political expenditures. Missouri's limits on total campaign expenditures and on candidates' expenditure of personal funds are directly analogous to two spending limits held unconstitutional in *Buckley*. *See* 424 U.S. at 51-59. The determination that limits on the expenditure of carryover funds burden political speech and are

subject to strict scrutiny is consistent with the judgment of the only other court that has addressed an analogous spending limit.[3]

2. Missouri does not argue that strict scrutiny is the wrong constitutional standard. Missouri does not argue that the court of appeals erred in holding that the state failed to make any showing that the limits on candidates' total campaign expenditures are narrowly tailored to achieve a compelling government interest. The state, instead, attempts to draw an analogy between its campaign expenditures limits and public financing programs. *See* Pet. 5-17. The state, however, fails to note that both courts below addressed and rejected this purported analogy. Pet. App. A-6 to A-8 (court of appeals); A-27 to A-29 (district court).

The state asserts that it has established a program of "voluntary expenditure ceilings" and that different restrictions on contributions and different disclosure requirements create an "incentive" to accept spending limits. Pet. 4, 5-8. This description of the Missouri statute is not consistent with the findings of both courts below that the statute is "coercive" and not voluntary. Pet. App.

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[3] A district court held that a California limit on the expenditure of carryover funds restricted the quantity of political speech and was invalid under *Buckley*. *Service Employees International Union v. Fair Political Practices Commission*, 721 F. Supp. 1172, 1175-1179 (E.D. Cal. 1989), *aff'd*, 955 F.2d 1312 (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992). The district court held that the State of California did not have any interest sufficiently compelling to justify restrictions on the expenditure of carryover funds. 721 F. Supp. at 1175-1179. Although California did not appeal from this judgment, the court of appeals, in passing on a limited appeal by another party, affirmed the district court's judgment. The court of appeals left no doubt that restrictions on the expenditure of carryover funds are not valid unless the state can demonstrate that the burdens that it has imposed on political speech are "narrowly tailored to serve a compelling state interest." *Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d at 1323 (*quoting Austin v. Michigan Chamber of Commerce*, 494 U.S. at 657).

A-7, A-8 (court of appeals), A-28 (district court). The state does not address the court of appeals' finding that its "incentive" argument is "disingenuous." Pet. App. A-8.

There is no analogy between the Missouri statute and the laws of other states, cited by Missouri, that restrict campaign expenditures as a condition of public financing.[4] *See* Pet. 9-17. The court of appeals rejected Missouri's argument that its spending limits are voluntary, and, consequently, the state's contention that the decision of the court of appeals "chills" the efforts of other states to establish "voluntary expenditure ceilings" is misplaced. *See* Pet. 17.

3. The court of appeals' judgment that Proposition A's spend-down provision violates the First Amendment does not rest, contrary to Missouri's assertion, on any "right of candidates to determine unilaterally what they may do with contributors' funds." *See* Pet. 17. Missouri does not cite anything in the opinion of the court of appeals that supports this assertion. *See* Pet. 19-25. The court of appeals actually held that the spend-down provision "restrict[s] expression protected by the First Amendment" and that the state did not demonstrate that it is "narrowly tailored to serve a compelling government interest." Pet. App. A-16; A-14 to A-16.

Missouri does not deny that strict scrutiny is the correct constitutional standard to protect political speech. The state, instead, suggests that the court of appeals' judgment is not consistent with this Court's decisions.

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[4] Similarly, there is no analogy between Missouri's limits on candidates' total campaign expenditures and state laws that prohibit candidates "from spending campaign contributions on particular items, and restricting cash expenditures above specified amounts." *See* Pet. at 9 (footnote omitted). Missouri has other statutes that limit the purpose of campaign expenditures and that limit the amount of cash expenditures, and these laws are not at issue here. *See, e.g.*, R.S.Mo. § 130.031.2 (expenditures of more than $50 must be by check), § 130.034 (allowable uses of campaign contributions).

The state's suggestion that the court of appeals misapplied this Court's decision in *Buckley* to invalidate Proposition A's spend-down requirement is mistaken. *See* Pet. 18-19. The court of appeals did not cite or discuss *Buckley* in the course of deciding that the restrictions on the expenditure of carryover funds were not narrowly tailored to serve a compelling government interest. Pet. App. A-12 to A-16. The state's contention that the court of appeals' judgment is "inconsistent with this Court's earlier denial of certiorari to review a similar Florida statute" is also mistaken. Pet. 19. A denial of certiorari is not a decision on the merits. *E.g., Teague v. Lane*, 489 U.S. 288, 296 (1989).

Missouri's argument that invalidation of Proposition A's restriction on the expenditure of carryover funds threatens the laws of many other states is overstated. *See* Pet. 20-25. There is no obvious analogy between many of the statutes that Missouri suggests are threatened by the court of appeals' judgment and Proposition A's spend-down provision. For example, the invalidatior of a restriction on the expenditure of carryover campaign funds does not seem to raise any doubt, contrary to the state's assertion, about "the constitutionality of statutes . . . that prohibit candidates from converting contributors' funds to personal use." Pet. 23-24. Even in Missouri, the effect of the court of appeals' judgment is quite limited. Although Proposition A's limits on candidates' expenditure of carryover funds have been held unconstitutional, Senate Bill 650 also imposes limits on the expenditure of carryover funds and those limits remain in effect. R.S. Mo. § 130.038; *see* Pet. App. A-12, n.5 (the court of appeals recognized that Senate Bill 650's limits on carryover funds were not at issue).

4. Finally, the record does not support Missouri's contention that the court of appeals imposed an "evidentiary requirement" that can be satisfied only by "legislative histories." Pet. 26. There is not one word in the opinion of the court of appeals that supports this contention. Missouri, nonetheless, argues that "[w]ithout saying so

explicitly, the court of appeals affirmed and endorsed the district court's view" that such evidence is required. Pet. 26-27. The district court, however, never adopted any such "view." Pet. App. A-22 ("[t]he Court does not agree . . . that . . . specific, historical factual proof" like legislative history or testimony about the electorate's intent is required). In these circumstances, any inference that the court of appeals imposed a novel evidentiary requirement is, at best, strained.

Similarly, the record does not support Missouri's argument that the court of appeals established a "new standard of review" because it " 'disagreed' " with the state's "conclusions" and did not "discuss the [state's] voluminous evidence." Pet. 26. The district court decided the case on cross motions for summary judgment, and there was no evidence, voluminous or otherwise, to be considered on the appeal. *See* Pet. App. A-17. The state did not present any evidence on its initial motion, but it did attach "exhibits" to a subsequent brief. Pet. App. A-22. The district court found that these "exhibits do nothing to prove or disprove either defendants' or plaintiffs' case" and concluded that there were "no genuine disputes of material fact." *Id.* at A-22, A-37.

The state, as the court of appeals found, did not make any argument in the district court that its "exhibits" created a genuine issue of material fact, and it agreed that the case should be decided on the cross motions for summary judgment. *Id.* at A-3. Missouri's contention that the court of appeals improperly ignored its "voluminous evidence" is at bottom an argument that summary judgment should not have been granted because its exhibits created a genuine issue of material fact. The court of appeals, however, expressly found that the state had "waived this issue" by failing to present it to the district court and that "[i]n any event, we are satisfied that no genuine issues of material fact remain in dispute." *Id.*

In short, the court of appeals did not impose any novel evidentiary requirement, and it did not establish

any "new standard of review." Instead, it required Missouri to respect First Amendment interests in political speech by making some showing that limits on candidates' campaign spending are narrowly tailored to serve a compelling government interest. The court of appeals applied this well-settled rule and found that "the state has failed to meet its burden." Pet. App. A-9; A-16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 19, 1996

APPENDIX

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STATUTORY PROVISIONS INVOLVED

Section 130.011(12)(a) Revised Statutes of Missouri (1994):

. . . "Contribution" includes, but is not limited to:

(a) A candidate's own money or property used in support of his candidacy other than expense of his food, lodging, travel, and payment of any fee necessary to the filing for public office;

Section 130.032.1 Revised Statutes of Missouri (1994):

In addition to the limitations imposed pursuant to sections 130.031 and 130.052, the amount of contributions made by or accepted from any person in any one election shall not exceed the following:

(1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, one thousand dollars;

(2) To elect an individual to the office of state senator, five hundred dollars;

(3) To elect an individual to the office of state representative, two hundred fifty dollars;

(4) To elect an individual to any other office, if the population of the electoral district, ward, or other unit according to the latest decennial census is under one hundred thousand, two hundred fifty dollars;

(5) To elect an individual to any other office, if the population of the electoral district, ward, or other unit according to the latest decennial census is at least one hundred thousand but less than two hundred fifty thousand, five hundred dollars; and

(6) To elect an individual to any other office, if the population of the electoral district, ward, or other unit

according to the latest decennial census is at least two hundred fifty thousand, one thousand dollars.

Section 130.038 Revised Statutes of Missouri (1994):

Within one hundred twenty days following the general election to fill the office for which the candidate has filed or declared, such candidate elected and any unsuccessful candidate shall dispose of any balance of campaign funds received after January 1, 1995 over expenses incurred for the campaign, except for a net cash balance not to exceed tweny-five percent of the campaign expenditure limit for the election cycle or seven hundred fifty thousand dollars, whichever is less, for each candidate for the office of governor; twenty-five percent of the campaign expenditure limit for the election cycle or three hundred seventy-five thousand dollars, whichever is less, for each candidate for all other statewide elected offices; twenty-five percent of the campaign expenditure limit for the election cycle or fifty thousand dollars, whichever is less, for each candidate for the senate; twenty-five percent of the campaign expenditure limit for the election cycle or fifteen thousand dollars, whichever is less, for each candidate for the house of representatives*; twenty-five percent of the campaign expenditure limit for the election cycle or fifteen thousand dollars, whichever is less, for any office of an electoral district, ward or other unit if the population of such electoral district, ward or other unit according to the latest decennial census is under one hundred thousand in population; twenty-five percent of the campaign expenditure limit for the election cycle or fifty thousand dollars, whichever is less, for an office of an electoral district, ward or other unit if the population of such electoral district, ward or other unit according to the latest decennial census is at least one hundred thousand but less than two hundred fifty thousand in population; and twenty-five percent of the campaign expenditure limit for the elec-

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* *Words "of representatives" not in original rolls.*

tion cycle or two hundred fifty thousand dollars, whichever is less, for an office of an electoral district, ward or other unit if the population of such electoral district, ward or other unit according to the latest decennial census is at least two hundred fifty thousand in population. Any balance on hand on January 1, 1995, shall not be included under this subsection if reported as provided in subsection 7 of section 130.032.

Section 130.100 Revised Statutes of Missouri (Supp. 1995):

Contribution limits: There shall be the following limitations on campaign contributions:

(1) No person or committee shall make a contribution to any one candidate or candidate committee with an aggregate value in excess of:

(a) $100 per election cycle per candidate in districts with fewer than 100,000 residents;

(2) $200 per election cycle per candidate, other than statewide candidates, in districts of 100,000 or more residents. For purposes of this section "statewide candidates" refers to those candidates seeking election to the office of Governor, Lieutenant Governor, Attorney General, Auditor, Treasurer and Secretary of State.

(3) $300 per election cycle per statewide candidate.

(2) No person, entity or committee shall make a contribution to any other persons, entities or committees for the purpose of contributing to a specific candidate which when added together or when added together with contributions made directly to the candidate or to the candidate's committee, will have an aggregate value in excess of the limits stated in section 1.*

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* Probably refers to subdivision (1) of this section.

(3) No candidate or candidate committee shall solicit or accept any contribution with an aggregate value in excess of the limits stated in this section.

(4) For purposes of this section, the term "candidate" shall include the candidate, the candidate's treasurer, and the candidate's committee and any contribution to the candidate's treasurer or candidate committee shall be deemed a contribution to the candidate.